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In the Supreme Court of the United States

OCTOBER TERM, 1971

MONTANA POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION AND THE SECRETARY OF THE INTERIOR IN OPPOSITION

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OPINIONS BELOW

The most recent opinion of the court of appeals (Pet. App. 1a-32a) is not yet reported. The earlier *en banc* opinion of the court of appeals (Pet. App. 35a-80a) is reported at 445 F.2d 739.[1] The opinion of the Federal Power Commission (Pet. App. 110a-142a) is reported at 38 FPC 766, and its order denying rehearing (Pet. App. 142a-146a) is reported at 39 FPC 321.

[1] The opinion of the original panel in this case (Pet. App. 82a-109a) was vacated by order of November 17, 1969. Petitioner's earlier petition for certiorari from the *en banc* opinion was denied at 400 U.S. 1013.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1972 (Pet. App. 33a-34a). A timely petition for rehearing was denied on April 7, 1972. The petition for a writ of certiorari was filed on May 24, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission had exclusive jurisdiction to readjust annual charges to petitioner for the use of tribal lands under Section 10(e), as amended, of the Federal Power Act, 16 U.S.C. 803(e).

2. Whether the Commission's readjustment authority under Section 10(e) of the Federal Water Power Act of 1920, 41 Stat. 1063, is limited to a determination whether the existing annual charge for Indian lands is unreasonable.

3. Whether the Commission's readjustment of annual charges should be retroactive to the end of the 20-year period for which the charges were initially fixed.

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act, as amended, 16 U.S.C. 791a *et seq.*, and of the Federal Water Power Act of 1920, 41 Stat. 1063, are set forth in an attachment to the petition.

STATEMENT

In 1967, the Commission determined that it had jurisdiction under Section 10(e) of the Federal Power Act, as amended, 16 U.S.C. 803(e), to readjust annual charges to petitioner for the use of the tribal lands of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (the "Tribes") (Pet. App. 111a). The Commission thereupon awarded the Tribes an increase in annual rental from $238,375 to $950,000, effective May 20, 1959 (Pet. App. 110a-111a, 143a).

On petitions for review, the court of appeals first held that the Commission was without jurisdiction to readjust the annual charges since petitioner was entitled under the terms of its license to submit the readjustment to arbitration (Pet. App. 90a). It remanded the case for submission to arbitration (Pet. App. 95a). On rehearing *en banc*, however, the court upheld the Commission's jurisdiction (Pet. App. 35a-80a). Petitioner's petition for a writ of certiorari to review this holding was denied. 400 U.S. 1013.

Since only the jurisdictional issue was considered by the *en banc* court, the case was referred back to a panel of the court of appeals for a hearing on the merits of the Commission's decision (Pet. App. 81a). After the case was reargued on the merits, the court of appeals affirmed the Commission's readjustment order, except to reinstate the 4 percent interest rate on the unpaid rentals as originally determined by the hearing examiner (Pet. App. 18a-20a). With respect to the three issues which petitioner raises here, the

court of appeals did not disturb its *en banc* decision that the Commission had jurisdiction over the readjustment proceeding (Pet. App. 3a-4a). On the extent of the Commission's authority to readjust the annual charges, the court upheld, with one judge dissenting (Pet. App. 22a-24a), the Commission's interpretation of the statute (Pet. App. 5a-6a). The court also affirmed, with a different judge dissenting (Pet. App. 27a-30a), the Commission's determination that the increase in annual charges should be effective as of the 1959 termination of the 20-year period for which the annual charge was initially set (Pet. App. 9a-11a).

ARGUMENT

Petitioner again attacks (Pet. 11-17) the *en banc* decision below that the Commission had jurisdiction to readjust the annual charges to petitioner for its use of the Tribes' lands. For the reasons set forth in our Brief in Opposition when the matter was previously before this Court (No. 838, October Term, 1970),[2] this contention is without merit and does not warrant review by this Court. The remaining issues raised by petitioner were also correctly decided by the court below and similarly present no significant questions of general importance.

The two issues which this Court did not have before it on the prior petition for certiorari both turn on the interpretation of the language of Section 10(e) of the Federal Water Power Act of 1920, 41 Stat.

[2] For the convenience of the Court, we are filing 10 copies of our earlier Brief in Opposition with the Clerk of the Court.

1063, that on "* * * tribal lands embraced within Indian reservations the commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations * * *."[3] Petitioner argues, as it did before the Commission, that the annual charges may be "readjusted" at the end of twenty years only if the Commission makes express findings that the original annual charges were unreasonable (Pet. 18-19). Both the Commission and the court below correctly rejected this position (Pet. App. 5a-6a, 124a-125a), on the ground that nothing in Section 10(e) or the license suggests such a limitation. In fact, the statute and petitioner's license establish only two broad standards: (1) the charges must be based on the commercial value of the lands for the most profitable purpose for which available including power development, and (2) the charges must be reasonable. The Commission determined that the most reasonable and fair method of readjusting the annual charges in this case was to apply the relevant standards *de novo* (Pet. App. 124a). We agree with the court of appeals' statement, in approving the Commission's determination, that "* * * it is more rea-

[3] The comparable provisions of Section 10(e) of the Federal Power Act as now in effect, 16 U.S.C. 803(e), are substantially identical: "* * * and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of Title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service * * *."

sonable to interpret Section 10(e) to permit the Commission to redetermine the rentals than to be bound to an earlier standard not currently acceptable in comparison with others" (Pet. App. 6a). Moreover, the Commission's own interpretation of the statute it administers is entitled to great weight. *Udall* v. *Tallman*, 380 U.S. 1; *Rosado* v. *Wyman*, 397 U.S. 397, 415.

The second new argument of petitioner concerns the portion of Section 10(e) of the 1920 Act which provides that "such charges may be readjusted *at the end of twenty years* after the beginning of operations * * *." [emphasis supplied.] The Commission held that any increase in the annual charge would be effective as of May 20, 1959 (Pet. App. 136a)—20 years after the project was placed in operation (Pet. App. 112a). The petition for readjustment was filed by the Tribes on May 19, 1959 (Pet. App. 110a). Petitioner argues that the language of its license, specifying that the payment of annual charges shall be at the rate specified "until adjustment of the annual charges payable hereunder shall have been effected" (Pet. 9; Pet. App. A6), prevents the adjustment from being effective before some unspecified date which is presumably later than 1959.[4]

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[4] Among the possibilities are 1965, the date hearings began before the Commission; 1967, the date of the Commission's order readjusting charges; 1968, the date the Commission denied the application for rehearing; 1972, the date the court of appeals disposed of the case; or some future date when this Court or one of the lower tribunals ultimately disposes of the case.

Petitioner's contention is without merit. As the court below correctly concluded, the only reasonable interpretation of Section 10(e) and petitioner's license is " * * * that until the readjustment proceedings are concluded the rentals shall continue to be paid as previously fixed, but that when the proceedings are concluded the readjusted rentals may be made effective from the end of the 20 year period" (Pet. App. 9a-10a). Any other interpretation would necessarily place a premium on dilatory tactics, prolong litigation and cause an irreparable financial loss to the Tribes (Pet. App. 10a, 120a). As the court below noted: "It is altogether reasonable to construe the statutory and license provisions, relied upon by the Commission, as authorizing the Tribes to receive for the periods of the delays [nearly 13 years to date] the increased rental found to be appropriate" (Pet. App. 10a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a–46a)[1] are not yet reported.[2] The opinion of the Federal Power Commission (Pet. App. 76a–108a) is reported at 38 FPC 766, and its order denying rehearing (Pet. App. 108a–112a) is reported at 39 FPC 321.

[1] "Pet. App." references are to the separate appendix to the petition filed by The Montana Power Company.

[2] The opinions were rendered by the court on rehearing *en banc*. The opinions of the original panel (Pet. App. 48a–75a) were vacated by order of November 17, 1969.

JURISDICTION

The order on rehearing en banc of the court of appeals (Pet. App. 47a) was entered on July 15, 1970. The petition for a writ of certiorari was filed on October 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals was correct in concluding that the Commission had exclusive jurisdiction to readjust annual charges to petitioner for the use of tribal lands under Section 10(e), as amended, of the Federal Power Act.

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act, as amended, 16 U.S.C. 791 *et seq.*, and of the Federal Water Power Act of 1920, 41 Stat. 1063, are set forth in an attachment to the petition.

STATEMENT

The Commission initiated this proceeding as a result of a petition filed in 1959 by the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (the "Tribes"), to readjust the annual charges paid by petitioner, The Montana Power Company, for use of tribal lands in conjunction with the operation of the Kerr hydroelectric project. The Kerr project has been in service since 1939 (Pet. App. 3a, 76a) under a license originally issued in 1930 subject to Section 10(e) of the Federal Water

Power Act of 1920 as then in effect, which authorized the Commission to fix a reasonable annual charge for the use of tribal lands and provided that after 20 years of service the "charges may be readjusted * * * in a manner to be described in each license." Article 30(D) of Kerr project license called for readjustment—on the basis of "the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development"—by agreement of the licensee, the Commission and the Secretary of Interior (then a member of the Commission),[3] or failing agreement by submission to arbitration (Pet. App. 79a–89a). Section 28 of the 1920 Act, which remains unchanged today, 16 U.S.C. 822, provided that no amendment to the Act "* * * shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder."

In 1935, Section 10(e) was amended to give the Commission[4] the authority to determine, upon notice and opportunity for hearing and subject to judicial review, the amount of any readjustment of annual charges under Section 10(e). The court below rejected petitioner's contention that the saving clause of Section 28 deprived the Commission of jurisdiction under the 1935 Act over readjustments under licenses issued prior to 1935.

---

[3] The Commission was then composed of the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture (41 Stat. 1063).

[4] The Commission was reconstituted as an independent regulatory agency with five commissioners in 1930, soon after the license was issued (46 Stat. 797).

Background. The original 1930 license was issued by the Commission with the approval of the Secretary of the Interior, to the Rocky Mountain Power Company, a wholly-owned subsidiary of petitioner (Pet. App. 2a–3a). Under this license, Rocky Mountain was authorized to commence within one year, and complete within three years thereafter, construction of a dam and powerhouse containing three generating units (J.A. 239).

Rocky Mountain failed to meet these deadlines as extended, and was in default under its license [5] at the time of the 1935 amendment to Section 10(e) of the 1920 Act mentioned above. In 1936, an amendment to the license was issued by the Commission (J.A. 260–275), extending to 1939 the time for the completion of the first generating unit of the project. The amended license, which was approved by the Secretary of the Interior and the Tribes, contained a waiver of any damage claims by the Tribes arising out of the initial default. In 1938, petitioner became the sole licensee of the Kerr project. The first generating unit became operational in 1939 and the second in 1949 (Pet. App. 89a).

The instant proceedings. As noted above, in the 1959 proceedings initiated by the Commission, petitioner challenged the jurisdiction of the Commission to make the 20-year readjustment in annual charges payable to the Tribes; petitioner argued that Article

[5] While the licensee was in default, the matter was referred to the Attorney General of the United States for proceedings to revoke the license (Pet. App. 30a, 78a). No formal action appears to have been taken on that request.

30(D) of its license, which was not in terms altered by the 1936 license amendment, gave it an absolute right to arbitration in the event the parties involved could not agree on the amount of the readjustment. After almost 10 years of litigation on the jurisdictional and diverse other issues, the Commission decided that it had jurisdiction and awarded the Indians an increase in rental from $238,375 to $950,000 per year effective May 20, 1959. (Pet. App. 76a–77a, 109a.)

On petitions for review, the court of appeals first held that the arbitration provision in Article 30(D) was "a substantive right, embodied in the contract, bargained for and bought by the Commission in its effort to secure a licensee for this project" (Pet. App. 56a). It remanded the case for submission to arbitration (Pet. App. 61a). On rehearing *en banc*, however, the court upheld the Commission's jurisdiction (Pet. App. 1a–46a), holding "that the 1935 statute, which made no changes in the substantive standard applicable under outstanding license for readjustment of tribal land charges, intended to prescribe the Commission as the tribunal for readjustment under outstanding as well as future licenses" (Pet. App. 2a). The court acknowledged that the saving clause of Section 28 of the 1920 Act (*supra*, p. 3) protects a licensee against changes in his substantive rights or duties under a license (Pet. App. 12a–13a), but ruled that that section did not constitute "a general prohibition against changes in the procedure or machinery applicable to a license, changes that do not have the quality of changing substantive rights or obliga-